Baxter Healthcare Corporation *and* Teamsters Local Union No. 61, affiliated with International Brotherhood of Teamsters, AFL–CIO.[1] Cases 11–CA–12772, 11–CA–13039, 11–CA–12980, 11–CA–13288–3, 11–CA–13362–1–2–3, and 11–CA–13566–3–4

March 31, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On July 31, 1991, Administrative Law Judge Peter E. Donnelly issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions as expanded on below and to adopt the recommended Order.

1. In adopting the judge's determination that the Respondent violated Section 8(a)(3) of the Act by discharging Lois Jimeson, we reject the Respondent's assertion that Jimeson was fired for violating a company policy proscribing the use of a leave of absence to ''engage in other employment.''

As the judge found, Jimeson began a medical leave of absence in February 1989. She promptly returned to work at the conclusion of her leave on June 1, 1989. Shortly thereafter Jimeson was informed by Ron Houser, the Respondent's manager of human resources, that a supervisor had seen her, in late May, waiting on customers in a local hardware store. Jimeson told Houser that she had been helping out part-time at her father-in-law's store and that she had not been paid anything for her time. Jimeson invited Houser to call the store and verify her story. Houser did not investigate further to determine if, in fact, Jimeson had been employed at the store. He did, however, with the concurrence of the corporate level termination review board, tell Jimeson that she would be discharged for working while on leave and receiving disability pay. Jimeson's written termination notice, dated several days later, also included a second ground for the discharge—''falsification of personnel or other records'' in violation of a company rule identified in the employee handbook as an offense ''so grave'' that ''discharge may be appropriate on the first violation.''

We agree with the judge that the General Counsel has established a prima facie case and that the Respondent has not met its burden of showing that Lois Jimeson would have been discharged even in the absence of her open and extensive efforts in support of the Union's organizing campaigns in 1988–1989. First, as the judge found, the Respondent's course of action against Jimeson was inconsistent with a nondiscriminatory motive. The testimony of the Respondent's own officials[3] demonstrates a history of considering compensation as a controlling factor in enforcing the prohibition against using a leave of absence to ''engage in other employment.'' The Respondent's practice, on receiving a report that an employee on sick leave was working another job, was to telephone the reputed employer to verify the employee's employment status. For example, Supervisor Mance testified, with respect to employee Joretta Roberts, that he personally called a company to ''verify that, in fact, she was on [its] payroll.'' In each of the three prior instances about which the Respondent testified, the followup investigation revealed a violation of the leave policy under the payroll test and the employee was either discharged or permitted to resign.[4]

If the Respondent was not discriminatorily motivated, but instead genuinely interested in whether Lois Jimeson had violated company policy by using her time on medical leave to ''engage in other employment,'' it is probable that Houser would have adhered to past practice in enforcing the leave policy. Instead, Houser decided to discharge Jimeson, a known union activist, without attempting to investigate her claim that she was, at the very end of her 4-month leave period, a part-time unpaid volunteer in a family business. As the judge found, Jimeson was just such a volunteer and thus not in violation of the company leave policy proscribing ''other employment'' as previously interpreted and applied by the Respondent.

Further, we find that at the hearing the Respondent abandoned its initial reliance on ''falsification'' of documents submitted by Lois Jimeson attesting to her medical disability and need for continuing medical leave. Houser admitted on cross-examination, after examining Jimeson's file, that he was not now claiming that any documents in Jimeson's file had been falsified. We note that, of the two grounds given for the

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] We note that in his decision, the judge made several insubstantial errors. First, the Respondent's plant manager is Mike Gatling, not Gatlin. Second, the meeting Gatling held with employees to announce when fingerprinting would begin was in May 1989, not December. We also note the inadvertent omission of ''not'' between ''she was'' and ''doing'' in the third sentence in the last paragraph of the judge's decision under the section entitled ''*Ella Mae Bailey's Discharge.*''

[3] Houser and William Mance, coordinating supervisor of the medical department, were responsible for medical leaves of absence.

[4] Additionally, employee Tracy Fuller resigned after the Respondent informed him that he would be terminated for overstaying the time period authorized by his physician for sick leave. The Respondent did not undertake any investigation to verify a rumor that Fuller was also working, in his own business, as a chimney sweep.

discharge, only the one now conceded to be without merit involved a company rule or policy which specifically provides in writing for the possibility of discharge.

In agreeing with the judge that the Respondent's asserted reasons for discharging Lois Jimeson were pretextual and that the Respondent violated Section 8(a)(3), we rely on the following factors: the Respondent's deviation from its customary policy of investigating reported instances of possible leave policy violations by directly contacting the employer involved in order to verify employment status, the absence of any evidence of similar treatment of other employees, and the shifting account of the reasons for and the circumstances of the discharge.[5]

2. John Jimeson is the husband of Lois Jimeson and, like her, was an employee of the Respondent with a tenure of more than 10 years who had been openly active on the Union's behalf since the beginning of its organizing efforts in April 1988. As the judge sets forth in his decision, the Respondent discharged John on Tuesday, October 17, 1989, when Houser informed him that his refusal to submit to mandatory fingerprinting when ordered to do so on the preceding Friday constituted insubordination and thus warranted termination.

The judge found, and we agree, that the General Counsel established a prima facie case of discrimination and that the Respondent has not met its burden of showing that John Jimeson's discharge would have occurred even in the absence of his leadership role in the Union's organizational drive. We reject the Respondent's contention that its established disciplinary policy mandated its response to Jimeson's Friday, October 13 statement that he was withholding his consent to fingerprinting until after he had consulted an attorney.

The following facts are essentially undisputed. In March 1989, the Respondent discovered a note claiming that someone had deliberately contaminated a bag of intravenous solution manufactured by the Respondent for the health care industry. In response the Respondent instituted certain safety precautions including a requirement that all employees be fingerprinted as a condition of their continued employment. In May 1989, the Respondent announced that the fingerprinting would begin in October.

On Friday, October 13, Jimeson was asked by the plant's safety manager to submit to fingerprinting that day. Jimeson declined and stated that he wished to obtain legal advice before so submitting. Later that day he repeated his position to several other management officials including Houser. Houser gave Jimeson an opportunity to telephone an attorney that afternoon from the plant. Jimeson then tried and failed to reach his attorney. Houser reminded Jimeson that he had had several months to obtain legal advice and told Jimeson that if he did not immediately consent to fingerprinting he would be suspended. Jimeson restated his conditional refusal and was immediately suspended. Houser informed him that during the suspension a full investigation would be conducted which would lead either to Jimeson's return or his termination.

Later on the afternoon of the suspension, Houser and Plant Manager Gatling submitted the matter to the corporate level Termination Review Board (TRB) with a recommendation for discharge. On Monday, October 16, Jimeson finally succeeded in contacting an attorney. That evening he told Houser that he was now prepared, on advice of counsel, to give his fingerprints. Houser responded that Jimeson's change of position was ''after the fact'' and thus too late. On Tuesday morning, Houser consulted with Gatling and together they informed the TRB of this new development. The TRB, with knowledge of Jimeson's willingness now to consent to the fingerprinting requirement, then approved the original recommendation in favor of termination. Houser promptly informed Jimeson that he was being terminated for the insubordinate act of refusing to comply with the mandatory fingerprinting requirement.

The Respondent argues that the procedures it followed in discharging Jimeson were consistent with its established disciplinary policy as set forth in the employee handbook. The handbook sets out the ''major'' offenses for which discharge ''may be appropriate upon the first violation.'' The list includes rule 8 relied on by the Respondent:

> Refusal or failure to obey orders or do assignments given by a supervisor or their authorized employee or Company representative. (Follow instructions, do the assigned work and any complaint or concern may be taken up later through established channels.)

Immediately following the list of major offenses is the following statement, set out in boldface:

> IN ASSESSING DISCIPLINARY ACTION, CONSIDERATION WILL BE GIVEN TO THE POSSIBILITY OF MITIGATING OR OTHER AGGRAVATING CIRCUMSTANCES.

Our dissenting colleague acknowledges that the General Counsel made out a prima facie case that

[5] We additionally agree with the judge, for the reasons set forth by him, that employee Ella Mae Bailey's discharge also violated Sec. 8(a)(3). As with the discharge of Lois Jimeson, the Respondent was discriminatorily motivated in interpreting its ''other employment'' rule and failed to demonstrate that it would have taken the same disciplinary action absent Bailey's activities on behalf of the Union.

Also see *NLRB v. Dayton Tire & Rubber Co.*, 503 F.2d 759 (10th Cir. 1974) (application of an employer's valid rule in an exaggerated, overlystrict manner exposes antiunion motive).

antiunion animus was a motivating factor in the discharge of Jimeson. He agrees, however, with the Respondent insofar as he would find that it carried its burden under *Wright Line*[6] of showing that it would, in any event, have discharged Jimeson for violating rule 8 by his initial conditional refusal to submit to the fingerprinting. We disagree because, in our view, the Respondent failed to show that the ''mitigating circumstances'' proviso to the Respondent's rules had no possible application to Jimeson and that therefore, even in the absence of animus against his overt union activism, it would have entirely disregarded his acquiescence to the fingerprinting requirement on the next workday following the initial order.[7]

As indicated in the fact statement above, Houser's initial permission for Jimeson to seek the advice of an attorney on October 13 suggests that the Respondent did not regard a request for time to consult an attorney as inherently inconsistent with carrying out its fingerprinting program, which was planned to extend over several days in order to get all 3000 employees fingerprinted. Granting that Jimeson's refusal to submit on that day, after his effort to reach an attorney was unavailing, came within the rule 8 refusal-to-obey-orders rubric, there remains the question whether Jimeson's acceptance of the requirement on Monday, after he had consulted an attorney, could be regarded as a ''mitigating'' circumstance. Although the Respondent has put forward an argument why it might not be so regarded—i.e., that Jimeson's obedience on Monday did not change the fact that he had refused an order on Friday—this is *only* an argument. It is not something that is clear on the face of the rules read as a whole[8] The term ''mitigating circumstances'' is left entirely undefined, and the Respondent has submitted no evidence to show that, in practice, a refusal predicated on a condition that the Respondent's managers have appeared to accept as nonfrivolous (here, the desire to consult legal counsel) would never be accepted as mitigated by the employee's recantion of the refusal on the next workday, after the condition is satisfied.[9]

We therefore conclude, in agreement with the judge, that, with respect to John Jimeson, the Respondent has not met its *Wright Line*, supra, burden to show that he would have been discharged even in the absence of his union activity.[10]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Baxter Healthcare Corporation, Marion, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER RAUDABAUGH, dissenting in part.

I agree with the majority and the judge that the Respondent violated Section 8(a)(3) by discharging Lois Jimeson and Ella Mae Bailey. I disagree, however, with their findings that the discharge of prounion employee John Jimeson was unlawful. Although the General Counsel made a prima facie showing of antiunion discrimination, I find that the Respondent met its burden of proving that it would have discharged him even in the absence of union activities.

The Respondent has shown that it lawfully discharged John Jimeson for his insubordinate refusal to accede to mandatory fingerprinting. He had several months' advance notice of the plantwide fingerprinting, giving him ample opportunity to consult with counsel about the matter. The Respondent had no legal obligation to delay his fingerprinting while he belatedly sought counsel, even if the individual delay would have had no impact on the several-day process of fingerprinting all employees, the factor which apparently persuaded the judge to find a violation. John Jimeson clearly engaged in unprotected insubordination by attempting to dictate the terms of his employment when he refused a direct order to submit to fingerprinting. The Respondent's disciplinary rule 8 expressly permits discharge for such misconduct. The Respondent met its burden of showing that it

[6] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[7] We do not accept our dissenting colleague's contention that we are requiring the Respondent to prove a negative. The ''mitigating circumstances'' proviso is an element of the Respondent's own rule, which it claims to have applied here. The Respondent was merely required to show how that element of its rule inevitably applied to persons in situations like Jimeson's.

[8] Our colleague appears to assert that because two of the Respondent's witnesses testified without contradiction that a recantation could not qualify as a mitigating circumstance, this ends the matter. The judge, however, obviously did not credit this self-serving testimony, since he found that it was not any requirement of the rule, but rather the Respondent's desire ''to remove an active union adherent from the work force,'' that accounted for the discharge.

[9] In the case of another employee who refused the order to submit to fingerprinting, David Snyder, no issue of the application of the ''mitigating circumstances'' provision was raised because Snyder, unlike Jimeson, *never* agreed to the order. Hence, the judge found that the Respondent met its *Wright Line* burden as to Snyder, and no party has excepted to that finding.

[10] *Finlay Bros. Co.*, 282 NLRB 737 (1987), relied on by the Respondent, is inapposite. There, the Board dismissed an alleged 8(a)(1) discharge and refusal to rehire where the employee was discharged for refusing to comply with his employer's dress code until he consulted his attorney. The employee, after determining that the rule was legal, asked for reinstatement. In *Finlay*, however, unlike the instant case, the employee had violated the employer's rule for more than a month before the discharge and, in opposing the rule, had fabricated employee opposition to it.

would have discharged John Jimeson even in the absence of his union activities.

My colleagues in the majority concede that the Respondent has met its burden of establishing that Jimeson refused to obey an order on October 13 and that such refusal fell within the proscriptions of rule 8. However, my colleagues have imposed an additional burden on the Respondent. According to them, the Respondent must also show that Jimeson's postmis-conduct recantation (i.e., his willingness to be fingerprinted on October 16) was not a ''mitigating circumstance'' under the Respondent's rule. My colleagues therefore require the Respondent to prove a negative. Even assuming arguendo that this is an appropriate allocation of the burden of proof, Respondent has carried that burden. The Respondent's witnesses testified as to the Respondent's disciplinary practices.[1] According to that testimony, when the Respondent is presented with evidence of a dischargeable offense, the Respondent suspends the employee and then investigates as to whether discharge is warranted. That investigation is limited to the incident and to the events leading to it. Subsequent acts are not relevant to the question of whether discharge is appropriate. Consistent with this practice, the Respondent did not consider Jimeson's postmisconduct recantation.

This testimony, given by two Respondent witnesses, was consistent and unrebutted.[2]

Concededly, the Respondent did not show a prior application of the aforementioned interpretation of the rule. But, this was because there has been no prior situation exactly like that of Jimeson's situation, i.e., recantation after the commission of the dischargeable offense. The law is clear that the Respondent need not establish a prior identical situation. ''It is rare to find cases of previous discipline that are 'on all fours' with the case in question, and the Respondent should not be faulted for being unable to show [such discipline].''[3]

Based on the above, I would find that the Respondent has met its *Wright Line* burden by proving that it has a rule permitting discharge for insubordination, that Jimeson engaged in insubordination, and that the mitigating circumstances provision in the Respondent's disciplinary rules does not apply to postmisconduct events.

Based on the foregoing, I would dismiss the complaint allegations with respect to the discharge of John Jimeson.

[1] See Tr. 558–562 (testimony of Plant Manager Mike Gatling) and Tr. 1238–1239 (testimony of Human Resources Manager Houser).

[2] My colleagues assert that the judge discredited this unrebutted and consistent testimony. However, they point to no such finding in the judge's decision. Perhaps, as suggested by colleagues, the judge could have rejected the testimony as self-serving. However, there is nothing to suggest that the judge did so. Finally, the fact that the judge ultimately found a violation is no substitute for a thorough analysis of all the testimony, including that which mitigates against finding a violation.

[3] *Merillat Industries*, 307 NLRB 1301 (1992).

Jane North and *Patricia L. Timmins, Esqs.*, for the General Counsel.

J. Hamilton Stewart III and *R. Allison Phinney, Esqs. (Ogletree, Deakins, Nash Smoak & Stewart)*, of Greenville, South Carolina, for the Respondent.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. The charges in the above-captioned cases were filed against Baxter Healthcare Corporation (Employer or Respondent) by Teamsters Local Union No. 61, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (Union or Charging Party). On December 20, the previously filed charges and complaints were consolidated into a second order consolidating cases, consolidated complaint, and notice of hearing. This complaint encompassed the charges in Cases 11–CA–12772, 11–CA–12980, and 11–CA–13039. On February 20, 1989, based on the parties having previously entered into a private out-of-Board settlement, the Regional Director issued an order conditionally approving withdrawal request and withdrawing consolidated complaint and notice of hearing. By letter dated June 9, 1989, the Regional Director revoked his order of February 20 and reinstated the charges in those three cases, except for the 8(a)(3) allegations as to Joyce Buchanan who had already been paid the backpay due her under the private settlement agreement. The Regional Director concluded: ''As a result of evidence adduced in the investigation of Case No. 11–CA–13288–3, it appears that Respondent engaged in unfair labor practices which warrant the issuance of a Complaint and Notice of Hearing. That investigation also indicates that the terms of the non-Board settlement in Cases Nos. 11–CA–12772, 11–CA–12980 and 11–CA–13039 mentioned above have been violated.'' On that same date, June 9, the Regional Director issued a third order consolidating cases, consolidated complaint and notice of hearing incorporating the allegations of the prior complaints, except for the 8(a)(3) discharge allegation against Buchanan. On January 31, 1989, a fourth order consolidating cases, consolidated complaint and notice of hearing issued incorporating the allegations contained in Cases 11–CA–12772, 11–CA–12980, 11–CA–13039, 11–CA–13288–3, and 11–CA–13362–1 –2 –3, and on November 1, 1989, a fifth order consolidating cases, consolidated complaint and notice of hearing (complaint) issued incorporating all the above-captioned charges

and the charges in Cases 11–CA–13566–3 –4.[1] Answers thereto have been timely filed by Respondent. Pursuant to notice, a hearing was held before the administrative law judge on November 15 and 16 and December 11, 12, 13, and 14, all in 1989. Briefs have been timely filed by General Counsel and Respondent, which have been duly considered.

FINDINGS OF FACT

I. EMPLOYER'S BUSINESS

Employer is a Delaware corporation with a facility located at Marion, North Carolina, where it is engaged in the manufacture and distribution of health care products. During the past 12 months, Respondent received at its Marion, North Carolina facility goods and raw materials valued in excess of $50,000 directly from points outside the State of North Carolina. The complaint alleges, the Respondent admits, and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. The 8(a)(1) allegations[2]

On March 21, 1989,[3] a note was found in the men's locker room at the plant reading, ''DANGER, ONE OF THE BAGS INGECTED [SIC] WITH METHYLPROENYL MARCH 20, 1989, 0130. BAXTER GIVE BETTER RAISE OR MORE WILL BE INJECTED THROUGH WIRE ON TRUCKS WITH NEEDLE. SO EASY TO DO!'' Respondent, being in the business of manufacturing a health care product, i.e., IV bags and intravenous solutions, promptly shut down all production and distribution operations and called a meeting of employees to address the incident. When division president, Pat Fortune, spoke to the assembled production employees on March 22–23 on their return to work, he conveyed the message that the incident was damaging to the Company's reputation and business and that it was being investigated by the FBI and local law enforcement authorities and that the perpetrator would be aggressively prosecuted. Fortune also urged anyone with knowledge of the incident to inform management. With respect to the incident, Fortune also alluded to a ''core of people'' in the plant who would be happy to see the plant destroyed.

Immediately after the speech, Carolyn Robertson, an employee and union supporter, was approached by fellow employees Brenda Greer and Irma Smith in the department where they worked. According to Greer and Smith, they discussed Fortune's speech and the incident. Greer asked Robertson, since Robertson was on the in-plant organizing committee to speak to those people about the incident since it involved the possible loss of employment. Robertson perceived these remarks as an accusation and wanted to pursue the matter with the personnel department. Thereupon, she headed to the office of Ron Houser, human resources manager. Greer and Smith followed her in. Robertson told Houser that she was upset that she had been accused of having some knowledge of the product tampering incident. Greer and Smith protested that they were not accusing. According to Smith, ''We were just concerned with the shutdown and severity of the problem and we wanted her to convey to whoever she could. To the people that she talked with. Because during the union campaign, quite honestly, we had just quit talking to one another.'' Houser tried to calm them and spoke about the value of restoring good relations between union supporters and company supporters. According to Robertson, he also told that Respondent thought it was the Union and that ''there is a band of people out there going around, spewing their discontent and anger and we are going to get rid of them, but we're going to do it legally this time,'' and that when Robertson protested her loyalty, Houser responded that he knew Robertson was loyal and that ''he didn't think [she] was one of the vicious ones.''

2. Discrimination against Sherry Harrison as to oral and written warnings

Harrison, a 16-year employee, works as a Kiefel machine operator in the Kiefel north room. Her supervisor is Leonard Grindstaff. Harrison was a member of the in-plant organizing committee and acted as an observer for the Union at both the original election on October 26 and 27, 1988, when the

[1] At the hearing, the Respondent moved to strike pars. 8(a) through (g) of the complaint on the grounds that those allegations had been disposed of by the Regional Director's approval of the private settlement agreement since there had been full compliance with the private settlement agreement and that Sec. 10(b) barred the Regional Director from reviving and incorporating them in the third order consolidating cases. After taking testimony thereon, the administrative law judge granted the motion and struck the allegations contained in pars. 8(a) through (g) from the complaint and those allegations are not treated herein. Also, at the hearing, the complaint was amended to reflect that Respondent's answer, rather than paragraph 7 of the complaint, accurately reflects the titles and spellings of the various individuals alleged to be supervisors. Also, General Counsel, at the close of its case-in-chief, moved to amend the complaint to delete the unfair labor practice allegations in par. 8(a) concerning Sam Trippie and Edward Michael Ollis; the allegations in par. 8(b) concerning Jeff Bainbridge, June Ward and Steve Weltler; par. 8(d) in its entirety and par. 13 in its entirety, which motion was granted, although pars. 8(a), (b), and (d) had already been removed from the complaint, as noted above, by Respondent's motion. In its brief, General Counsel moved to withdraw par. 8(h) of this complaint, which motion is hereby granted.

[2] As noted above, those allegations covered by the private settlement agreement (pars. 8(a) through (g)) have, on motion of the Respondent, been deleted from the complaint and are not treated herein. Having granted other motions dismissed by the General Counsel, as noted above, only those 8(a)(1) allegations set out in pars. 8(i) and (j) of the complaint remain for disposition herein.

[3] All dates refer to 1989 unless otherwise indicated. None of the other participants were able to corroborate Robertson's testimony. Smith's testimony, corroborated by Greer, specifically denied that Houser made the statements attributed to him, and Houser himself denied making those remarks. I am convinced, based on the probative, corroborated testimony in the record that Houser did not make the statements attributed to him which form the basis of the General Counsel's contention that Houser either threatened employees with discharge for having engaged in union activity or created an impression among employees that Respondent was engaging in surveillance of their union activities.

Union lost, and at the rerun election on January 25 and 26, 1989. Harrison handbilled on behalf of the Union, wore a union badge, union T-shirt, and solicited union authorization cards for signature. It is undisputed that Harrison was an active union supporter.

On March 2, 1989, Harrison, because her Kiefel machine was down, was assigned to inspect injection sites.[4] She was seated, performing the inspections, when Becky Jolly, a supervisor in the heat seal room, passed her work station. Jolly testified that as she passed, she felt injection site tips hitting her legs below her knees. In the belief that Harrison had thrown the tips at her, Jolly went to Leonard Grindstaff, who was Harrison's supervisor, to report the incident. Grindstaff questioned Harrison who denied having thrown any tips at Jolly.

Harrison then left and went to Houser's office to explain the incident to Houser. As she left Houser's office, Jolly went in, apparently to relate her version, which prompted Harrison to return, complaining to Houser that she had been falsely accused by Jolly of throwing sites at her. Houser arranged a meeting for 8:30 a.m. in the office of Steve Hughes, shift supervisor, to discuss the matter. Hughes supervised both Grindstaff and Jolly.

At 8:30, a meeting was held in Houser's office. Present were Houser, Hughes, Grindstaff, Jolly, Harrison, Vic Crawley, operations manager, and Fred Koon, production manager. Both Jolly and Harrison recounted their version of the incident. Apart from the incident itself, Houser also admonished Harrison about her communication problems with other employees. Harrison returned to work, but the meeting continued with the management officials who decided that the evidence was inconclusive and that a reenactment of the incident would assist them in determining culpability.

[4] These were tips about three-quarters of an inch in length and about the width of an eraser, where needles are inserted to release the solution from the IV bag. Houser, Crawley, Koon and Hughes then repaired to the cafeteria for further discussion of possible courses of action. They determined that the evidence was not sufficient to establish that Harrison had deliberately thrown the tips at Jolly but that Harrison should be counseled about her attitude toward management and other employees to encourage her to cooperate more with fellow employees. The counseling session was held at 3 p.m. in Koon's office, attended by Koon, Harrison, Hughes, and Grindstaff. Hughes did most of the talking. He told Harrison that the ill will between her and Jolly suggested that she had thrown the tips, but the evidence was not so conclusive as to warrant discharging her. Hughes also spoke about the ill will and lack of communication that had developed during the union organizational effort and that those problems needed correcting. In discussing prounion and antiunion employee relationship problems, Hughes mentioned that he had heard that Harrison had told a procompany employee, Cathy Knight, the wife of a supervisor, that she hoped her husband ''died and went to hell.'' Harrison denied to Hughes that she said this to Knight but at the hearing did concede that she did say, in anger and frustration on election day after learning the Union had lost, to a smiling Cathy Knight that she would like to see if Knight was still smiling when her husband's ''butt'' was in a courtroom over the NLRB charges. Hughes denied that Harrison was given either an oral or written warning but he did tell Harrison that if another incident occurred which could be substantiated, she could be terminated and that a memo documenting the incident would be put in her file. This was done.

At about 10 a.m., the scene was reenacted in the Kiefel north room, attended by all those at the 8:30 meeting plus Sam Trippie, plastics department manager.

Discussion and Analysis

The General Counsel contends that the oral warning of March 2 and the subsequent written ''memo for record'' dated March 3 constitute discrimination and that the discrimination was motivated by Harrison's union activity. First, I agree with General Counsel that these were actual warnings rather than nonpunitive actions. The Respondent takes the position that they were not punitive because they were issued outside of the Respondent's written progressive disciplinary policy which provides for formal warnings and notice thereof to employees. On this point, the General Counsel must prevail. The warnings were disciplinary, and it is immaterial whether or not the issuance was within or without the Company's written disciplinary policy.

However, the General Counsel is also obliged to show that the discipline was motivated by antiunion considerations. After the election, the Respondent had a legitimate business motive in reestablishing a cooperative attitude between employees, which had been disrupted during the Union's organizational effort. Prounion and antiunion sentiments had divided the work force, and Respondent did have an interest in restoring harmony in the work force. This was true even though, during the Union's organizational effort, Respondent used inherently divisive techniques to combat the Union. But promoting improved relations between employees was the main thrust of the counseling given to Harrison, as the March 3 memo suggests. His mention of the Cathy Knight incident was consistent with efforts to reconcile pro and antiunion sentiment among the employees. As for the warning, while it is true that the evidence was not sufficient to conclude that Harrison deliberately threw tips at Jolly, there was enough evidence to support a strong suspicion, and I cannot say in these circumstances the warnings were not justified. Respondent acted on a strong suspicion founded on substantial evidence. It is not for me to sit in judgment on the quantum of probative evidence necessary to justify discipline.

In short, it is the General Counsel's burden to establish that the oral and written warnings were motivated by antiunion considerations, and the evidence to support this contention is insufficient.

3. Discrimination against Harrison as to Respondent's telephone call policy

There is a telephone in the Kiefel north room where Harrison works. This telephone, however, does not have the capability to either receive or make calls outside the plant. It is an intraplant phone only. Employees are allowed to use the phone to contact other employees in making transportation arrangements or other such matters.

As to incoming calls from outside the plant, those calls are all taken by the receptionist/switchboard operator. If the call is an emergency, the operator calls the employee's work area and the employee is directed to the nurses station where the call can be returned. If the call is not an emergency, the operator will call the work area where the employee is notified of the call and may return the call at breaktime, using one

of pay phones located in the plant. It is the written policy of the Respondent to ''discourage personal phone calls during working time, except for emergency purposes.''

In late December or early January, it appears that Grindstaff received complaints from other employees to the effect that while Grindstaff was at lunch, Harrison was spending the entire time on the telephone talking to her boyfriend, a former security guard at the plant.[5] It appears that these calls were coming through the guard station.[6] With this information, Grindstaff went to the Phil Castro, environmental manager, charged with overall responsibility for the security operation which is contracted out to Guards Mark, Inc., who are directly supervised by Captain Dewey Proctor, a Guards Mark employee. Castro testified that Grindstaff came to him and explained the complaints he had received about Harrison. Castro was aware that personal calls should not be transferred directly to employees in production areas from the guard station, and so he went to Proctor with a request that the policy be enforced ''across the board'' at all times by the security guard at the guard station. Proctor agreed and posted a handwritten notice to that effect on the billboard in the guard station. Proctor testified that he did, himself, enforce the policy once thereafter when a call from Harrison's boyfriend was transferred to the guard station when the boyfriend wanted to speak to Harrison and was refused. Harrison concedes that she was aware that it was normal procedure for outside personal calls to be returned at breaktimes.

Discussion and Analysis

The General Counsel contends that Respondent applied this telephone call policy to Harrison in a discriminatory manner. I do not agree. It is undisputed that the policy itself was not discriminatory. Under the terms of the policy, personal telephone calls were not to be taken directly in the work area by the employees. The policy was for the employee to be advised and, except in emergencies, return the calls from pay phones at breaktime. Respondent was advised that Harrison was receiving outside calls directly in the work area. The proper authorities were advised and the policy reinforced. Despite Harrison's testimony that Grindstaff said that she should be aware that she would be singled out because of union activity at the plant, there must be something to show actual disparate treatment. There must be sufficient evidence to show that while the policy was applied to Harrison, it was not applied to others and that the motive for such discriminatory application was Harrison's union activity. In my opinion, the record is totally insufficient to make such a finding and this allegation should be dismissed.

[5] On January 6, Hughes also noticed Harrison on the telephone for what appeared to be an excessive time. Hughes asked Grindstaff to admonish Harrison about it, which he did. Harrison testified that Grindstaff also said to her that she should know she would be singled out when things came up on account of the union campaign.

[6] The guard station performed the functions of the operator on the second and third shift, and had the capacity to transfer calls directly to the work areas.

4. Discharges of Lois Jimeson, Ella Mae Bailey, John Jimeson, and David Snyder

Lois Jimeson's Discharge Lois Jimeson was a long-term employee of Respondent with over 10 years of service at the time of her discharge. Jimeson actively supported the Union's organizational effort beginning in August 1988 by handbilling employees with prounion literature in full view of Respondent's supervisors. She wore union T-shirts, jackets, and badges and was a member of the union in-plant organizing committee, whose members' identities were known to management since their names had been submitted to management. In addition, it appears that during the campaign, Jimeson wrote to Vernon Louck, chairman and CEO of Respondent, to complain about comparative salary levels. Management generally, and Houser, were aware of this communication.

In November 1988, Jimeson, whose job was to affix blue tip protectors to IV bags, developed pain and swelling in her left wrist and arm. In February 1989, after a period during which she was assigned light duty, Jimeson was placed on short-term disability where she remained until the end of May.[7]

Following her disability, Jimeson was able to perform some household chores and do some gardening. In addition, during the last few weeks of May, at the request of her mother-in-law, Jimeson helped out at the True Value Hardware Store owned by her father-in-law, John Jimeson Jr. For approximately, 8 to 10 days during that time, she worked for varying numbers of hours but never full days and she was not compensated for her work. It appears that it was customary for family members to help out at the store without compensation. While she was at the store in late May, Eddie Durham, a supervisor, came into the store to buy a ladder. Jimeson assisted him. Durham testified that she told him that she was just working there to help out the family because they were short-handed.

On his return to the plant, Durham related the incident to Houser who advised him to write up a memo on it, which he did, setting out the event in detail. On May 26, Jimeson's doctor advised her that she could return to work on May 30. Due to her prior scheduled vacation, Jimeson actually returned to work on June 1. On Tuesday, June 6, Jimeson was summoned to Houser's office. Production Manager Terry Duncan was also present. Houser told her that he was informed that she had been seen working at the hardware store. Jimeson responded that she had been helping out her in-laws at the store, but that she had not been paid for the time and asked Houser to call the store to confirm her account. After conferring with Gatlin, both decided that Jimeson should be terminated but thought the matter should be reviewed by the termination review board, particularly since Jimeson had contacted corporate officials in the past and they wanted to avoid having ''corporate'' surprised by another direct contact by Jimeson. The termination review board agreed with the discharge, and the following day Jimeson was again summoned to Houser's office, again Duncan was present. Houser advised Jimeson that she was going to be terminated because

[7] The diagnosis was carpal tunnel syndrome.

she was working at the hardware store while receiving short-term benefits.

On Monday, June 12, Houser gave Jimeson a termination notice reciting as the reason for discharge, ''Violation of Company Rule No. 2, 'Falsification of personnel or other records.' Employee was working another job while on sick leave receiving sick pay from our Company.''

Ella Mae Bailey's Discharge

Bailey was employed for over 10 years by Respondent at the time of her discharge. She was an active union supporter. In this regard, she was a member of the 125 employee in-plant organizing committee. A list of those employees was submitted to management by the Union. Bailey also distributed union authorization cards, participated in prounion handbilling, and wore union T-shirts and badges at the plant.

The events leading to Bailey's discharge began with foot problems which required corrective surgery on the toes of both feet. Since she was unable to perform her job, which required her to stand most of this time, she was placed on short-term disability leave.[8] The short-term disability plan defines those entitled to the benefits and reads, in pertinent part:

> Normally, a total disability is one that results from illness or injury and prevents you from doing your present job at Baxter. To receive benefits under the STD plan, you and your doctor will have to substantiate the disability.

Company policy treats the granting of leaves of absence in a document captioned ''General Rules With Respect To Leaves of Absence.'' This policy provides, inter alia: ''Leaves of absence shall not be used to engage in other employment.'' ''An employee who misrepresents any facts or submits any false evidence in applying for or substantiating a leave of absence may be subject to discharge.''

Bailey began a leave of absence on February 7. Corrective surgery, a bunionectomy, was performed on her right foot on February 21. After a period of recuperation, the same operation was performed on her left foot on March 28. Physical activities, including standing or walking, were restricted as much as possible. Bailey's recovery was monitored by a doctor who periodically submitted ''attending physician's statements'' to Respondent. Bailey also submitted a ''Claimant's Intermediate Statement'' on May 15, advising Respondent that she would be able to return to work full-time on May 28. One of the blocks on this form reads: ''Are you now engaged in other gainful employment?'' Bailey checked the ''No'' box to the question.[9]

It also appears that while on disability, Bailey was suffering some financial hardship. Her husband was not working and her disability pay, after deductions, left her with very little money. Bailey and her husband decided to take some household items to a flea market in order to raise some money. They collected some of her husband's tools, pots and pans, and several wicker household items. These items, decorated by Bailey with bows, ribbons, and flowers included brooms, hats, and a wicker hamper which her husband had painted. She decorated a total of about 18 items. Bailey and her husband took these items to Kidds Flea Market on three Saturdays in a row from late April until mid-May and her items were displayed once by someone else on her behalf at another flea market on I-40, however, Bailey did not sell any of her decorated items prior to her discharge on June 14.

On one of the Saturdays in May, at Kidds Flea Market, one of Respondent's supervisors, Wilma Beam, saw Bailey at her booth with the items on display. They spoke for a few minutes until Beam left. At a supervisor's meeting about a week later, Beam mentioned the matter to Supervisor Mike Harris. Harris suggested that she inform Ron Houser, human resources manager, and Beam did so.

Bailey returned to work on June 12 at 7 a.m. On June 13, shortly after break, she was called to Houser's office. Supervisor Mike Harris was also present. Houser told Bailey that it had come to his attention that she had been performing other work while she was on leave of absence. He went on to identify the work as making and selling arts and crafts at a flea market. Bailey protested that she needed the money and that these were not ''arts and crafts,'' that they were personal items, some gifts, belonging to her and that she had decorated them to sell at the flea market. Houser advised her that it was against company policy to be on medical leave and at the same time make items for sale. Bailey was told that she would be advised later of whatever disposition was made of the matter.

Following this discussion, later in the day, according to Houser, he first learned from another employee that Bailey was a union supporter. It also appears that Houser consulted Plant Manager Mike Gatlin about the situation. They reviewed the information and agreed that termination was the appropriate discipline, but that since it was an unusual matter, they should run it by the Termination Review Board at the corporate level. This was done on the following day, and the termination review board agreed.

On the following day, June 14, Bailey met with Harris, Guy Fusio, a human resources manager, Carolyn Yelton, a supervisor, and Houser. Houser told Bailey that because she was making arts and crafts for sale, while on disability, she had violated Company policy and that it would be necessary to terminate her. Once again, Bailey protested that these were her personal items that she had decorated and offered for sale and that she was doing ''arts and crafts.'' Houser gave her the opportunity to resign, which Bailey declined, and she was discharged. Respondent's ''Employee Separation Report'' recites the reason for Bailey's discharge as ''Violation of Company Rule # 2. 'Falsification of personnel or other records.' Ellen Bailey was working on another job while on sick leave and receiving sick pay from our Company.'' Houser testified that the falsified document referred to was the ''Claimant's Interim Statement'' when Bailey had checked the ''No'' box to the question of ''gainful employment.'' According to Houser, since the items were made and offered for the purpose of sale, this constitutes gainful employment. Apparently, it did not matter to Houser whether any of the items were actually sold.

[8] Respondent's short-term disability benefits run to a maximum of 23 weeks, and long-term disability benefits for longer periods.

[9] Bailey's disability was extended, and she was actually authorized by her doctor to return on June 12.

Analysis and Conclusions—Discharges of Jimeson and Bailey

It is not disputed that both Jimeson and Bailey were long-time and apparently satisfactory employees. It is also clear that both were active union supporters, members of the in-plant organizing committee, distributing pamphlets and otherwise supporting the Union's effort to organize Respondent's employees. Respondent generally, and particularly Gatlin and Houser, were aware that they were union supporters.

The General Counsel takes the position that it was because of their activities on behalf of the Union during the union organizational effort that Jimeson and Bailey were discharged. Respondent contends that Jimeson and Bailey violated established policies as to short-term disability benefits, were caught and then lawfully discharged.

In this regard, Respondent argues that where its leave policies provide that ''Leaves of absences shall not be used to engage in other employment,'' the term ''other employment'' means with or without compensation. Under a strict interpretation, an employee on short-term disability could be required to remain basically immobile while off work on a short-term disability, despite the fact that short-term disability is defined as only an inability to perform the employee's job with Respondent. No one disputes the legitimacy of Jimeson's or Bailey's short-term disabilities. This conceded, it appears that Respondent could, under pain of discharge, prevent employees receiving short-term disability from engaging in almost any type of activity while on short-term disability, including housework, vegetable gardening, hobbies, investments, or other work, however remotely income enhancing, despite the fact that in order to qualify for short-term disability benefits, employees need only not be able to perform their job with Respondent. Respondent can, however, make such interpretations, but when it does, it invites scrutiny when applied to union supporters. Such restrictive interpretations in the circumstances of this case are suspect. In my opinion, they were not made in good faith and were interpreted and applied to Jimeson and Bailey because they had been open and active union supporters.

In short, I conclude that neither Jimeson nor Bailey violated any nondiscriminatory interpretation of Respondent's relevant policies or rules, and that the narrow and restrictive interpretations made by Respondent were motivated by a desire to displace active union adherents.

But may not an employer interpret and enforce personnel policies as restrictive as it wishes even to an absurdity? The fast answer is ''yes,'' so long as it does not discriminate. In this case, Respondent contends that the rules were uniformly applied and cites examples. However, in none of these examples does it appear that the employees were working without compensation, like Jimeson, nor were they essentially selling items that belonged to them, like Bailey, even conceding that she did decorate them. Moreover, she sold none of them until after she was discharged.[10] In those examples recited by Respondent, all those employees were employed by other employers, except for Fuller, who owned his own business.

Having concluded that Respondent was discriminatorily motivated in interpreting and applying its personnel and leave policies, and that the assigned reasons were pretexts, I must, nonetheless apply to this case the *Wright Line* criteria.[11] In this regard, I am satisfied, based on the record, that the General Counsel has made a prima facie showing, as it must, that the protected activity was a motivating factor in the discharges. In this regard, I note that any conceivable transgressions were unintentional, trivial, did not violate any policy as written; that both were long-term and apparently competent employees; and that the discipline was Draconian. I further conclude that Respondent has failed to meet its burden of demonstrating that Jimeson and Bailey would have been discharged even in the absence of their protected activity.

Accordingly, on this record, I conclude that both Jimeson and Bailey were discharged unlawfully in violation of Section 8(a)(3) of the Act.

John Jimeson's Discharge

Jimeson, a packing department employee, was employed by Respondent for over 10 years at the time of his discharge on October 17.[12] Jimeson was active on behalf of the Union from the beginning of the organizational effort in April 1988. He distributed union authorization cards, attended union meetings, was a member of the in-plant organizing committee, and known to be such by management, since the names of those comprising the in-plant organizing committee had been submitted to Respondent. Jimeson also distributed union handbills some two or three times a week outside the plant on a regular basis during the organizational effort, and was observed by supervisors of the Respondent. Jimeson wore union badges and T-shirts at the plant and acted as an observer for the Union at both the original elections on October 26 and 27, 1988, and the rerun election held on January 25 and 26, 1989. With his wife, Lois, he attended hearings, presumably NLRB representation case hearings, concerning matters of employee eligibility. In September 1988, the employees conducted a march to the post office to publicize the mailing of union authorization cards it had obtained. The march was covered by local television, and Jimeson was interviewed on television.

By way of background, as noted above, it appears that on the night of March 20, a hand-printed note was discovered on Respondent's premises claiming that a bag of Respondent's IV solution had been injected with a type of alcohol. Respondent shut down operations for 2 days and contacted the FBI and local law enforcement agencies. The author of the note has never been identified, but the FBI did recommend that certain safety precautions be initiated by Respondent, including the fingerprinting of employees. The plant employees were advised as early as May 1989 that Respondent intended to fingerprint all employees. In a meeting during December 1989, Gatlin again, in meeting with the employees, advised them that fingerprinting would begin in the plant in October 1989. Gatlin and his staff were fingerprinted on September 26. Notices were posted on or about October 2 showing pictures of the staff being fingerprinted and advising employees that fingerprinting

[10] In these circumstances, it is difficult to understand why the ''Employee Separation Reports'' recite a ''falsification'' of records by representing that they were ''gainfully employed.''

[11] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See also *Chicago Tribune Co.*, 300 NLRB 1055 (1990).

[12] Jimeson is the husband of discriminatee Lois Jimeson.

would begin for the plant on October 13. On October 11, a memorandum was distributed to supervisors and read to the employees, again advising that fingerprinting would begin on October 13 as a ''condition of employment.'' Fingerprinting in the plant began on October 13 and went on for some days in order to accommodate those on leave or otherwise unavailable. The fingerprinting station was set up in the nurses station to fingerprint the ''stragglers.'' In all, some 2700 employees and about 300 contract employees were eventually fingerprinted.

As to Jimeson, it appears that on Friday, October 13, when he was summoned to be fingerprinted by Steve Connell, safety manager, he told Connell, at the fingerprinting site, that he wanted to see an attorney before he would agree to be fingerprinted. Connell told him that if he was not going to be fingerprinted, to leave, to return to his job, and he would be contacted by a supervisor. Jimeson returned to work and went to lunch at about 12:20 p.m. with David Snyder, who expressed to Jimeson a desire to speak to a lawyer before submitting to fingerprinting. Jimeson had obtained the name of a lawyer from another employee, and at lunch, both tried to contact him without success and returned to work.

At about 1 p.m., Jimeson was approached by Manufacturing Supervisor Harry Hollifield and Packaging Supervisor Bobby Gunter about being fingerprinted, and again he declined without first being able to speak to an attorney. Hollifield explained that it would be necessary for Jimeson to speak to Houser about the matter, and he and Jimeson went to Houser's office. Several times during the ensuing discussion, Houser asked Jimeson if he was refusing to be fingerprinted and Jimeson responded that he was not refusing but that he wanted first to seek the advice of an attorney and if the attorney agreed, he would be glad to supply his fingerprints to the Company. Houser offered Jimeson the use of a telephone to call a lawyer, but Jimeson declined, opting to make the call from a pay phone in the plant. He was unable to reach the attorney and returned to Houser's office where he was advised by Houser that he had had ample time to consult an attorney previously and that if Jimeson refused, he would be suspended. Jimeson reiterated his position that he wanted to speak to an attorney before he agreed. Hollifield removed Jimeson's I.D. badge. Houser told Jimeson that he was being suspended pending a full investigation which could lead to either his return or his termination.

At about 3:30 p.m., Gatlin and Houser, who had previously discussed the suspensions of both Jimeson and Snyder,[13] called Tom Hull, corporate employee relations manager, reviewed the suspensions with him and they recommended that Jimeson and Snyder be discharged for refusing to be fingerprinted. Out of a concern for Lois Jimeson's prior contacts with the NLRB, and since the fingerprinting requirement was unique, it was decided to submit the matter to the four-member termination review board along with their recommendation for discharge and, at about 5 p.m., Gatlin and Houser contacted Bob deBaun, division vice president of human resources, one of the termination review board members, to explain the matter.

On Tuesday, October 17, at about 9:45 a.m., a conference call was made to the plant wherein Houser and Gatlin were advised that the termination review board agreed with their recommendation to terminate.

After leaving on Friday, October 13, Jimeson again called the attorney, who was out of town, and Jimeson was unable to reach him until the following Monday, October 16, when he advised him to give his fingerprints, and to so advise the Company. At 1 p.m., Jimeson attempted to call Houser at the plant and was advised that Houser was in a meeting. Jimeson continued to call Houser without success several times during the afternoon at the plant. At about 6 p.m., Jimeson reached Houser at his home. He told Houser that he had seen his attorney and that he was ready to come in to be fingerprinted. Houser told Jimeson that his change in position was too late; ''after the fact'' and not acceptable, and told him that he would call him by 1 p.m. on Tuesday; that ''There are some folks in Chicago that I still have to talk with, but I will be in touch with you tomorrow.'' On Tuesday morning, Houser spoke to Gatlin about Jimeson's agreement to be fingerprinted and Gatlin agreed with Houser that Jimeson was too late. Later in the morning during a conference call, they advised the termination review board that Jimeson had agreed to be fingerprinted but, like Houser and Gatlin, they took the position that a disciplinary suspension for insubordination does not provide an opportunity for the employee to reconsider his action, but only to gather facts to decide on appropriate discipline. Later, that morning, Houser called Jimeson and advised him that he was being terminated for refusing to be fingerprinted. Jimeson's ''Employee Separation Report'' cites insubordination as the reason for separation, along with the explanation, ''Employee refused to comply with employment requirements [fingerprinting].''

David Snyder's Discharge

Snyder, like Jimeson, worked in the packaging department and was employed by Respondent for over 10 years until he was discharged on October 17.

Like Jimeson, Snyder was an active union adherent beginning in May 1988 through both the original and the rerun elections. Snyder was a member of the in-plant organizing committee, a fact known to management. He wore union T-shirts and buttons at the plant and he also participated in the march to carry union authorization cards from the union hall to the post office where they were dispatched to the NLRB to support the Union's election petition. The march was televised by local television, and Snyder appeared in the coverage.

With respect to the fingerprinting, as noted above, Snyder spoke to Jimeson at lunch on October 13 and, like Jimeson, decided to seek legal advice about being fingerprinted. Snyder also believed that a court order might be necessary to require fingerprinting of the employees. As noted above, they were unsuccessful in contacting the attorney at lunch and after lunch, while at work, like Jimeson, he was called to be fingerprinted. He told Connell that he felt that the Company needed a court order and that he would seek legal counsel. Connell advised him that if he refused, he would be sent home. Nonetheless, he refused and returned to work.

Shortly after Jimeson's suspension, Hollifield and Gunter approached Snyder and they told him that they understood that he was refusing to be fingerprinted. They asked again if he would be fingerprinted, and when he refused, they es-

[13] In the meantime, Snyder had been suspended. His discharge and suspension are treated below.

corted him to Houser's office. Once there, Snyder maintained his position that he was refusing because he felt the Company needed a court order and he was unable to reach his attorney. Snyder declined Houser's offer to use his telephone to call the attorney and also declined Houser's offer to use a pay phone.

Houser told him that his refusal would result in his suspension for the day and that on Monday he would be subject to termination; or returned to work after an investigation. He was told to call Houser on Monday and was then escorted by Hollifield from the plant. That night Snyder called the union hall and spoke to an official who agreed that the Company needed a court order, but that their lawyer was out of town and might get back with him on Sunday. Snyder never received a call from the attorney and has not since spoken to an attorney about the matter. Snyder did not call the plant on Monday but he did call on Tuesday, October 17, at which time he was advised by Houser that he and Jimeson had been terminated for refusing to be fingerprinted. It is undisputed that Snyder has never since agreed to be fingerprinted by the Respondent.

Analysis and Conclusions—the Discharges of Snyder and Jimeson

The record establishes that both Jimeson and Snyder were open and active union adherents and that the Respondent was aware of their union sentiments and that all of this activity took place in circumstances wherein the Union was seeking representation and the Respondent was vigorously opposing it.[14] The question of whether or not Jimeson and Snyder were discharged because of their union activity requires a review of the record.

First, as to Jimeson, it is not disputed that Respondent could require, as a condition of employment, fingerprinting of employees. This being the case, Respondent would have the right to suspend or discharge any employee who refused to submit to the fingerprinting. However, based on the probative facts of this case, Jimeson never refused to be fingerprinted. What Jimeson sought was time to seek the advice of counsel on the legality of the fingerprinting requirement before committing himself. From the beginning of the entire incident, Jimeson made it clear that this was his reason for refusing to be fingerprinted when asked. This is what he told Houser during his first visit to Houser's office on Friday, October 13. He made several attempts on Friday to reach his lawyer and finally succeeded on Monday morning and was advised to submit to the fingerprinting. He called Houser right away and several times thereafter during the day on Monday to convey that message. Finally, he reached Houser at home at about 6 p.m. on Monday night and told him he agreed to be fingerprinted. Houser, without hesitation, rejected Jimeson's agreement, telling him that it was too late. Clearly, it was not too late since the matter was still pending at the corporate level and, in fact, no decision was made until Tuesday morning.

Respondent, however, contends that this was insubordinate conduct for which discharge was appropriate. Respondent likens it to the physical abuse of a supervisor where an employee is suspended and repents after the abuse to avoid discharge. The analogy limps. In this case, the damage had not been done. All that was necessary was that Jimeson's fingerprints be taken. He has agreed. The basis for the discharge has been removed. This presented no practical problem since employees were still being fingerprinted and it would be at least several more days until the project was complete. There was no reasonable basis for refusing Jimeson's agreement to submit to the fingerprinting, and no reasonable basis for pursuing the matter to discharge viewed in a total evidentiary context, particularly where Jimeson was a long-time and apparently competent employee. I am satisfied that Jimeson was not allowed and be fingerprinted because Respondent wanted to remove an active union adherent from the work force. In essence, Respondent refused to allow Jimeson to comply with a valid condition of employment and it would have done so except for Jimeson's union sentiments and activity.

Applying a ''*Wright Line*'' concept to the facts persuades me that the General Counsel has made a prima facie showing sufficient to support the inference that Jimeson's union activity was a motivating factor in Respondent's decision to discharge him. Further, the Respondent has not met its burden of demonstrating that it would have discharged him even in the absence of his union activity. Further, Respondent has not shown how it would have been in any way disadvantaged by allowing Jimeson to be fingerprinted. Accordingly, I conclude that Jimeson's discharge violated Section 8(a)(3) of the Act.

Snyder, on the other hand, once having decided not to be fingerprinted without first consulting an attorney, did not thereafter contact an attorney and never thereafter advised Respondent of his willingness to be fingerprinted so as to comply with Respondent's condition of employment. Essentially, Snyder's refusal to comply with a valid condition of employment was not justified. In these circumstances, Snyder's termination was not unlawful, even assuming that Respondent welcomed the opportunity to rid itself of a union adherent. Accordingly, I recommend that the 8(a)(3) allegation as to Snyder be dismissed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close and intimate relationship to traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I have found that Respondent discharged John Jimeson, Lois Jimeson, and

[14] General Counsel contends that Jimeson and Snyder were engaged in protected concerted activity in refusing to be fingerprinted while they sought legal advice and that this, in addition to their other union activity, was the unlawful basis for their discharges. I do not agree. It is undisputed that Respondent's fingerprinting requirement was, per se, valid, no violation can be predicated thereon. Moreover, the facts disclose that Jimeson and Snyder were acting independently and not in concert in refusing to be fingerprinted before obtaining legal counsel.

Ella Mae Bailey for reasons which offended the provisions of Section 8(a)(3) and (1) of the Act. I shall therefore recommend that Respondent make them whole for any loss of pay they may have suffered as a result of the discrimination practiced against them. All backpay and reimbursement provided herein, with interest, shall be computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging John Jimeson, Lois Jimeson and Ella Mae Bailey, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Baxter Healthcare Corporation, Marion, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees in order to discourage their membership in or activities on behalf of Teamsters Local Union No. 61, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to John Jimeson, Lois Jimeson, and Ella Mae Bailey immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent employment, and make them whole for any loss of pay they may have suffered as a result of the discrimination practiced against them in the manner set forth in the remedy section of this decision.

(b) Expunge from its files any references to the discharges of John Jimeson, Lois Jimeson, and Ella Mae Bailey, and notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel action against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(d) Post at its manufacturing and distribution facility in Marion, North Carolina, copies of the attached notice marked ''Appendix.''[16] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by Respondent's authorized representative, shall be posted by it immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge employees in order to discourage their membership in or activities on behalf of Teamsters Local Union No. 61, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer to John Jimeson, Lois Jimeson, and Ella Mae Bailey full reinstatement to their former jobs or, if those jobs no longer exist, to substantial equivalent employment, and make them whole for any loss of pay they may have suffered as a result of the discrimination practiced against them.

WE WILL expunge from our files any references to the discharges of John Jimeson, Lois Jimeson and Ella Mae Bailey, and notify them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel action against them.

BAXTER HEALTHCARE CORPORATION